No. 82-1607

Office-Supreme Court, U.S.
FILED
MAR 30 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BUNKFELDT BROADCASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

NATIONAL ASSOCIATION OF BLACK OWNED
BROADCASTERS,
Intervenor

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the District of Columbia Circuit

Lauren A. Colby,
532 Pearl Street,
Frederick, Maryland,
21701,

Counsel for Petitioner

QUESTION PRESENTED

Whether the Federal Communications Commission has the authority, under the constitution, to enact a Rule which prohibits the filing of an application for radio broadcasting facilities unless the applicant is a member of a "minority group", as defined by the Commission's Rules?

PARTIES TO THE PROCEEDING

The parties to this proceeding are: Bunkfeldt Broadcasting Corporation, Petitioner; the Federal Communications Commission, Respondent; and, the National Association of Black Owned Broadcasters, Intervenor.

TABLE OF CONTENTS

Opinions Below ---------- 2

Jurisdiction ---------- 2, 3

Question Presented ---------- 2

Statutes Involved ---------- 3, 4

Statement of Case ---------- 4 - 7

Reasons for Granting Certiorari ------ 7 - 10

Conclusion ---------- 10

Appendices

A. Judgment of the U.S. Court of Appeals, District of Columbia Circuit ---------- 12, 13

B. Order of the U.S. Court of Appeals, District of Columbia Circuit ---------- 14, 15

C. Order of the U.S. Court of Appeals, District of Columbia Circuit ---------- 16, 17

D. Memorandum Opinion and Order, Federal Communications Commission ---------- 18 - 22

TABLE OF AUTHORITIES

Cases.

Decisions of the Courts:

University of California Regents v. Bakke, 438 U.S. 265 (1978)---- 6, 9

Frontiero v. Richardson, 411 U.S. 677 (1973)---------- 8

Rules and Regulations:

47 C.F.R. 73.37---------- 3, 4

47 C.F.R. 73.2080(c)---------- 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

BUNKFELDT BROADCASTING CORPORATION,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS,
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Bunkfeldt Broadcasting Corporation, respectfully prays that a writ of certiorari issue to review the

judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on January 6, 1983.

OPINIONS BELOW.

The United States Court of Appeals for the District of Columbia Circuit decided this case without opinion. A copy of the Judgment of the Court, filed January 6, 1983, is attached hereto in the Appendix. Additionally, on February 7, 1983, the Court issued an Order denying rehearing. A copy of that Order is also attached in the appendix. Also attached is the Opinion of the FCC, released February 2, 1982.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 6, 1983, and this petition for certiorari was filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved. However, two Rules of the Federal Communications Commission are involved; Section 73.37(2) (47 C.F.R. 73.37) provides in pertinent part that applicants must comply with the following:

> (2) Application for a new unlimited time station or for night-time facilities by an authorized day-time station or for a major change in facilities resulting in operation on one of the 25 Class I channels listed in Sec. 73.25(a) by any authorized station:
>
> (i) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized standard broadcast station or service from an authorized FM broadcast station with a signal strength of 1 mV/m, or greater, or,
>
> (ii) That proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and that no FM channel is available for use in that community, or,
>
> (iii) That at least 20 percent of the area or population of the community designated in the application receives fewer than two aural services at night

from authorized stations, and that no FM channel is available for use in that community, or,

(iv) That minority persons hold over 50 percent of the ownership interests in the applicant for a Class II-B station on one of the 25 Class I channels listed in Section 73.25(a), or,

(v) That the applicant proposes to operate a Class II-B station noncommercially on one of the 25 Class I channels listed in Sec. 73.25(a).

Additionally, Section 73.2080(c) (47 C.F.R. 73.2080(c)) of the Commission's Rules and Regulations defines "minorities" as "American Indians and Alaskian Natives; Asians and Pacific Islanders; Blacks, not of Hispanic Origin; Hispanics; and women. . ."

STATEMENT OF THE CASE.

Section 73.37 of the Rules and Regulations of the Federal Communications Commission prohibits the filing of applications for new full-time AM broadcast stations or for changes in facilities of existing stations, except upon a showing that the applicant complies

with certain enumerated conditions. Among other things, the Rule provides that even if an applicant for a Clear Channel station cannot meet any one of the other conditions for acceptance of his application, he is still entitled to have his application accepted if he is a member of an officially recognized "minority group".

Bunkfeldt Broadcasting Corporation is the owner of a small daytime-only broadcast station at Utica, New York. Bunkfeldt desired to improve the facilities of its station. Accordingly, Bunkfeldt filed an application to change the frequency of its AM station to a Clear Channel (1200 kHz) and to expand the station's hours of operation from daytime-only to unlimited time. Bunkfeldt was unable to comply with any of the required conditions, laid down by the Rule. However, if Bunkfeldt had been a member of an officially recognized

minority group, it is undisputed that Bunkfeldt's application would have been acceptable for filing.

In a Petition, accompanying its application to the Federal Communications Commission, Bunkfeldt argued, inter alia, that it was unfair for the Commission not to accept its application, merely because Bunkfeldt's principals were Caucasians, when the application would have been perfectly acceptable if only Bunkfeldt's principals had been members of one of the officially approved racial groups. In support of its position, Bunkfeldt cited the opinion of this Court in University of California Regents v. Bakke, 438 U.S. 265 (1978).

The Federal Communications Commission rejected Bunkfeldt's application in a Memorandum Opinion and

Order, a copy of which is appended to this brief. Bunkfeldt appealed to the U.S. Court of Appeals for the District of Columbia, which entered judgment dismissing the appeal without opinion.

REASONS FOR GRANTING THE WRIT.

1. This case presents an important constitutional issue which deserves to be decided. Petitioner believes that no other government agency has enacted Rules, making race an absolute test for the acceptance for filing of an application, or for eligibility to participate in a government program. Some other agencies have enacted Rules to assist poor or disadvantaged people and these Rules have, in many instances, served to help people who belong to minority groups. However, that has been an incidental effect, resulting from the fact that members of minority groups are, in many instances,

disadvantaged and/or poor. The Rule enacted by the Federal Communications Commission, however, specifically confers upon minority persons a right not available to other races: namely, the right to apply for a Clear Channel station, in circumstances where other people cannot file such an application. That is unfair and violates the due process clause of the Fifth Amendment of the Constitution, which has been held to prohibit racial and sexual discrimination by federal authorities. Frontiero v. Richardson, 411 U.S. 677 (1973).

2. The Court of Appeals erred, when it refused to issue an opinion, in this matter. The matter is bound to arise again, because there are other applications pending before the Federal Communications Commission which raise the question as to whether the Commission can

properly impose a racial test for acceptance for filing of an application. Other applicants have also raised the question as to whether a racial test violates the decision of this Court. University of California Regents v. Bakke, 438 U.S. 265 (1978).

Thus, this Court could do a service to the broadcast industry, generally, and to the public, by deciding the question once and for all.

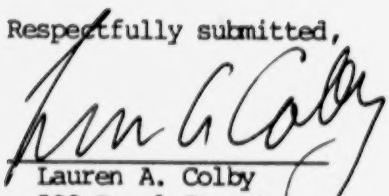
3. In University of California Regents v. Bakke, cited supra, this Court ruled that the University of California could not impose a quota system to exclude a person from attending that school because of his race. The Rule we challenge here is worse than a quota system. The effect of the Rule is to absolutely prohibit the filing of an application, if the applicant is not a

"minority" and cannot satisfy some other exception to the Rule. Hence, the Rule imposes a racial test for acceptance for filing and results in the absolute disqualification of an applicant who fails to meet that test.

4. Petitioner is not a racist; its principals are not racists. Petitioner would not and does not desire to deny to anyone the right to file an application because of his race. What Petitioner objects to is the fact that it was not permitted to file an application, merely because its principals were not of the "correct" race.

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



Lauren A. Colby
532 Pearl Street
Frederick, MD 21701

Counsel for Petitioner

In the
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

January 6, 1983

No. 82-1212

BUNKFELDT BROADCASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS,
Intervenor.

Before ROBINSON, Chief Judge, WILKEY, Circuit Judge, and GESELL, District Judge.*

JUDGMENT

This cause came on for consideration of a petition for review of orders of the

---

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. Section 292(a) (1976).

Federal Communications Commission, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

Upon consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that the orders ofthe Federal Communications Commission under review in this cause be and hereby are affirmed.

It is further ordered that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1982 and June 15, 1982.

Per Curiam
For the Court

George A. Fisher
Clerk

B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

February 7, 1983

No. 82-1212

BUNKFELDT BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS,
Intervenor

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

O R D E R

Appellant's suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc
that the aforesaid suggestion is denied.

Per Curiam

For the Court

GEORGE A. FISHER
CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

February 7, 1983

No. 82-1212

BUNKFELDT BROADCASTING CORPORATION,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS,
Intervenor

BEFORE: Robinson, Chief Judge, Wilkey, Circuit Judge and Gesell*, Judge, United States District Court for the District of Columbia

O R D E R

On consideration of appellant's petition for rehearing, filed January 25, 1983, it is

*Sitting by designation pursuant to Title 28 U.S.C. Section 292 (a).

ORDERED by the Court tnat the aforesaid petition is denied.

Per Curiam

For the Court

GEORGE A. FISHER
CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 82-84, 30766

In re Application of	)	
	)	
BUNKFELDT BROADCASTING CORPORATION (WUTQ)	)	File No. ARN-810113AD
Utica, New York	)	
	)	
Has: 1550 kHz, 1 kW, D	)	
Req: 1200 kHz, 1 kW, U	)	
	)	
For Construction Permit	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 11, 1982
Released: February 19, 1982

By the Commission: Commissioner Fogarty absent; Commissioner Jones concurring in the result

1. By letter of March 30, 1981, the Chief of the Broadcast Bureau, pursuant to delegated authority, declined to waive Section 73.37(e) of the Commission's Rules so as to accept for filing the application of Bunkfeldt Broadcasting Corporation for changes in the facilities of station WUTQ, Utica, New York. Bunkfeldt has applied to us for review of that action. WSOQ, Inc., whose application for changes in the facilities of station WSOQ, North Syracuse, New York, would have been mutually exclusive with the Bunkfeldt proposal had that proposal been accepted, opposed the waiver request and opposes the application for review as well. Bunkfeldt replied to both opposition pleadings.

2. Section 73.37(e) sets forth criteria designed to insure in the AM band the "fair, efficient and equitable distribution of radio service" mandated by Section 307(b) of the Communications Act of 1934, as amended. With respect to Bunkfeldt's application and to others for unlimited-time stations on the U.S. Class I-A frequencies, the provision requires as a precondition to acceptance for filing a showing of: (1) service to unserved or underserved areas, (2) a proposed first or second local nighttime aural service, (3) 50-percent minority ownership, or (4) an intent to operate noncommercially. In challenging the Chief of the Broadcast Bureau's refusal to waive these criteria for its benefit, Bunkfeldt attacks the first two provisions as arbitrary and capricious and the provision fostering minority ownership as unconstitutional. (Applicant advances no other substantial reason for waiver of Section 73,37(e)(2).) We consider each of these arguments in turn.

3. It is undeniable that stations in suburban communities enjoy an advantage over stations in urban communities where nighttime operating authority is desired. The fewer facilities licensed to a particular community, the more likely it is that a first or second local nighttime service or a service to unserved or underserved areas can be proposed. Preferences of one kind or another are inferent in any allocation scheme, however, and the preferences reflected in these portions of Section 73.37(e)(2) are long standing ones which have stood the test of time.[1] WSOQ proposes a first nighttime service to the community of North Syracuse and its application is acceptable for filing under

---

1 This portion of Section 73.37(e)(2) was adopted by Report and Order, Broadcast Station Assignment Standards, 39 FCC 2d 645 (1973).

Section 73.37(e)(2)(ii) as a result.[2] However, much unhappiness this may cause Bunkfeldt, it cannot complain of unfairness simply because WSOQ's submission is acceptable for filing under established criteria while its submission is not.

4. While we have been aware for some time of the need for additional minority owned stations, see e.g. our Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978), we did not formally accept applications for filing on this basis until quite recently.[3] Clear Channel Broadcasting in the AM Broadcast Band, 78 FCC 2d 1345; reconsid. granted in part and denied in part, 83 FCC 2d 216 (1980). Bunkfeldt raises here the question of whether the relevant provision--Section 73.37(e)(2)(iv)--operates as an absolute bar to nonminority applicants, a function which Bunkfeldt contends would violate the Equal Protection Clause of the Fourteenth Amendment, or as but one of several criteria to be weighed and balanced in allocation scarce spectrum space, a function which we believe is consistent with the controlling opinion of Mr.

---

3 Waivers of Section 73.37(e)(2) were quite common, however. See e.g. Atlass Communications, Inc., 61 FCC 2d 995 (1976); Por Favor, Inc., 68 FCC 2d 73 (1978).

2 Bunkfeldt seems to suggest that WSOQ is not in fact a North Syracuse station, but serves instead the larger city of Syracuse. Such contentions, if properly documented, are appropriately raised in the context of a petition to deny the WSOQ applciation. They have no bearing on the instand proceeding.

Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

5. It is the essence of Bunkfeldt's argument that access to spectrum space in urban areas is by virtue of Section 73.37(e)(2)(iv) limited to minority applicants, it being impossible to may any of the other acceptance criteria in such communities. The very facts of the instant proceeding belie this argument, however. WSOQ, Bunkfeldt's potential competitor, has rendered its application acceptable for filing by proposing service to an underserved suburban community. This option is available to other applicant's as well.[4] Noncommercial operation (Section 73.37(e)(2)(iv), though clearly inapplicable to Bunkfeldt, could be a feasible avenue for another applicant. Finally, our waiver provision is not a mere formality, and we intend to examine with care such requests as are presented to us. See in this regard, 83 FCC 2d at 219. To the extent then that Bunkfeldt's access to spectrum space in an urban area may be limited, it is limited not by the racial composition of its owners but rather by its failure to meet any of a number of qualifying attributes.

6. Convinced as we are that our acceptance criteria do not exclude applicants solely on the basis of race, we confirm once more our confidence that race need not be ignored in this context. Full minority participation in the ownership of broadcast facilities diversifies control of the media of

---

4 Bunkfeldt suggests that it might have avoided our rules by specifying—but not in fact serving--an underserved suburban community of license. Such a course of action, while technically feasible, would be inconsistent with the obligations of truthfulness and candor we expect of applicants and licensees.

mass communication, diversifying in the process the source and content of programming available to the public. In this manner, an "uninhibited marketplace of ideas," the paramount concern in broadcasting, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), is fostered. Surely, the "robust exchange of ideas" found by Mr. Justice Powell to justify the competitive consideration of race and ethnic origin at the university level, 438 U.S. at 313, justifies comparable treatment in the broadcast area, the First Amendment interests in an"uninhibited marketplace of ideas" and in a "robust exchange of ideas" being indistinguishable for these purposes. Hence, we find in Bakke, supra, total support for Section 73.37(e)(2)(iv) as written and applied. See 78 FCC 2d at 1369. We conclude therefore that as applied to the Bunkfeldt application, Section 73.37(e)(2) is neither arbitrary and capricious nor unconstitutional.[5] We further conclude that Bunkfeldt has presented no reason warranting waiver of Section 73.37(e)(2).

7. Accordingly, IT IS ORDERED, That the application for review filed by Bunkfeldt Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

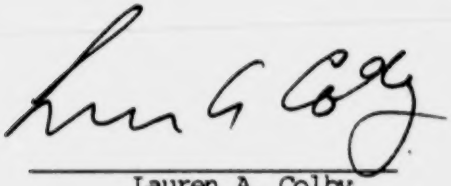
---

5 Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), does not, as Bunkfeldt claims, require acceptance of all proposals mutually exclusive with an existing application. Rather, Ashbacker holds that once mutually exclusive applications are accepted for filing, they must be considered in a consolidated comparative hearing.

CERTIFICATE OF SERVICE

Lauren A. Colby, a member of the bar of the Supreme Court of the United States, hereby certifies that a copy of the attached Petition for a Writ of Certiorari was deposited in the United States mail this 30th day of March, 1983, postage prepaid, addressed to the following:

General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554



Lauren A. Colby

Office - Supreme Court, U.S.
FILED
JUN 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1607

In the Supreme Court of the United States

OCTOBER TERM, 1982

BUNKFELDT BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether equal protection principles are violated by a rule of the Federal Communications Commission permitting minority-owned businesses to apply to broadcast full time on an AM radio clear channel without meeting certain service requirements applicable to others seeking such permission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Regulations involved	1
Statement	3
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Broadcast Station Assignment Standards In re, 39 F.C.C.2d 645 3

Clear Channel Broadcasting in the AM Broadcast Band, In re, 78 F.C.C.2d 1345, reconsideration granted in part and denied in part, 83 F.C.C.2d 216 aff'd, 670 F.2d 1222 ..... 4, 5

Director v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983) 7

Fullilove v. *Klutznick*, 448 U.S. 448 7-8

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 7

Larson v. *Valente*, 456 U.S. 228 7

Regents of the University of California v. *Bakke*, 438 U.S. 265 ..... 6, 7

United Steelworkers v. *Weber*, 443 U.S. 193 8

Valley Forge College v. *Americans United*, 454 U.S. 464 7

Page

Statute and regulations:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. V) 2000-e *et seq.* :

42 U.S.C. 2000e-2(a) 8

42 U.S.C. 2000e-2(d) 8

47 C.F.R.:

Section 73.37(e)(2) 2, 5
Section 73.37(e)(2)(i) 3
Section 73.37(e)(2)(iii) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1607

BUNKFELDT BROADCASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12-A13) is unreported. The opinion of the Federal Communications Commission (Pet. App. A18-A22) is reported at 88 F.C.C. 2d 1696.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12-A13) was filed on January 6, 1983, and rehearing was denied on February 7, 1983 (Pet. App. A14-A17). The petition for a writ of certiorari was filed on March 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

REGULATIONS INVOLVED

47 C.F.R. 73.37(e)(2) provides:

> (e) In addition to a demonstration of compliance with the requirements of paragraph (a), and, as

appropriate, paragraphs (b), (c) and (d) of this section, an application for a new AM broadcast station, or for a major change (see § 73.3571(a)(1) of this chapter) in an authorized AM broadcast station, as a condition for its acceptance, shall make a satisfactory showing, if new or modified nighttime operation by a Class II or Class III station is proposed, that objectionable interference will not result to any authorized station, as determined pursuant to § 73.182(o) of this chapter, and, for all classes of stations, a satisfactory showing as indicated below for the kind of application submitted.

* * * *

(2) Application for a new unlimited-time station or for nighttime facilities by an authorized daytime station or for a major change in facilities resulting in operation on one of the 25 Class I channels listed in § 73.25(a) by any authorized station:

(i) That at least 25 percent of the area or population which would receive interference-free primary service at night from the proposed station does not receive such service from an authorized AM broadcast station or service from an authorized FM broadcast station with a signal strength of 1 mV/m, or greater, or,

(ii) That the proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and that no FM channel is available for use in that community, or

(iii) That at least 20 percent of the area or population of the community designated in the application receives fewer than two aural services at night from authorized stations, and that no FM channel is available for use in that community, or

(iv) That minority persons hold over 50% of the ownership interests in the applicant for a Class II-B station on one of the 25 Class I channels listed in § 73.25(a), or,

(v) That the applicant proposes to operate a Class II-B station noncommercially on one of the 25 Class I channels listed in § 73.25(a).

STATEMENT

1. In 1973, the Federal Communications Commission ended a four-year freeze on acceptance of applications for new AM facilities and major modifications of existing stations. *In re Broadcast Station Assignment Standards*, 39 F.C.C.2d 645 (1973). However, the Commission adopted rules to preclude applications that, if granted, might cause excessive interference with existing stations without serving any pressing, unmet need. Thus, any applicant for a new unlimited time station or any authorized daytime station seeking to broadcast at night was required to show (39 F.C.C.2d at 681) that objectionable nighttime interference would not occur and that either

a) at least 25% of the area or population that would receive interference free nighttime service from the proposed station did not receive such service from an authorized AM or FM station, or

b) no FM channel was available in the community designated in the application and at least 20% of the community received nighttime service from fewer than two AM or FM stations.

These rules are now embodied in 47 C.F.R. 73.37(e)(2)(i) and (iii).

2. In order to ensure that all parts of the country received service from at least one radio station, the Commission long ago authorized the operation of 25 Class I-A clear channel

AM radio stations. See *In re Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345, 1352 (1980), reconsideration granted in part and denied in part, 83 F.C.C.2d 216 (1980), aff'd, 670 F.2d 1222 (D.C. Cir. 1982). These are high power stations whose "skywave" signal was given maximum protection at night in order to provide "secondary" service to so-called "white areas"—areas not receiving nighttime service from any other AM station (*id.* at 1349-1351). AM signals propagated horizontally provide "primary" or "groundwave" service; their range is limited by the curvature of the Earth (*id.* at 1350). At night, AM signals radiating upward often reflect off the ionosphere, travel back to earth, and provide "secondary" service to points hundreds and sometimes thousands of miles away (*ibid.*). This phenomenon is known as "skywave transmission" (*ibid.*). For a skywave signal to be effective, it must be protected from interference by other stations on the same frequency (*id.* at 1350-1351). Therefore, in order to maximize the coverge of the Class I-A stations, the Commission originally granted them exclusive use of their frequencies. In 1961, the Commission permitted assignment of a single Class II-A station on 11 (later 12) Class I-A channels. *In re Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 565 (1961). And in 1980 the Commission opened the way for approximately 100 additional AM stations to operate full time on the clear channel frequencies (78 F.C.C.2d at 1347).

In making this decision, the Commission concluded that several factors, including the growth of FM radio, had decreased the need for long range clear channel service (see 78 F.C.C.2d at 1353-1371). The Commission found that the value of such service was outweighed by the need for programming responsive to local needs (see *id.* at 1364). The Commission noted that many communities with primary service during the day lacked such service at night, or had

only one source of primary service at night, because their local stations were prohibited from broadcasting during those hours in order to prevent interference with skywave transmissions by Class I-A channels (*id.* at 1359).

The Commission also noted the need for more minority-owned stations (*id.* at 1368-1369). The Commission found that its 1973 rules concerning applications for new or increased AM facilities had precluded application by stations proposing to serve minority communities in larger cities. The Commission therefore adopted a rule permitting application by minority-owned enterprises but made clear that such applicants would be "subject to all the procedural and substantive requirements for their comparative consideration with any mutually exclusive applicants meeting any of the other qualifying conditions of the rules" (*id.* at 1369).

Today, those wishing to operate a new unlimited time station and authorized daytime stations wishing to broadcast at night may apply if they meet one of the requirements established in 1973. In addition, 47 C.F.R. 73.37(e)(2) permits such applications if

> (ii) * * * the proposed station would provide the community designated in the application with a first or second authorized nighttime aural transmission service, and * * * no FM channel is available for use in that community, or
>
> * * * * *
>
> (iv) * * * minority persons hold over 50% of the ownership interests in the applicant for a Class II-B[1] station on one of the 25 Class I channels listed in § 73.25(a), or,

[1] "Class II stations provide either wide area or more localized service. They must provide substantial interference protection to Class I-A and I-B stations, but receive no protection from the interfering signals of those stations." *In re Clear Channel AM Broadcasting, supra*, 78 F.C.C.2d at 1351-1352.

(v) * * * applicant proposes to operate a Class II-B station noncommercially on one of the 25 Class I channels listed in § 73.25(a).

3. Petitioner Bunkfeldt Broadcasting Corporation, the licensee of a daytime-only AM radio station in Utica, New York, sought to modify its facilities to broadcast full-time on a newly-available clear channel (Pet. App. A18; Pet. 5). Since petitioner could not meet any of the criteria for application, it requested a waiver (*ibid.*). Petitioner's application would have been mutually exclusive with an application previously filed by station WSOQ in North Syracuse, New York. WSOQ is not minority-owned and was able to satisfy the criteria for application (Pet. App. A18-A21). WSOQ opposed petitioner's waiver request (*id.* at A18).

The Commission's Broadcast Bureau denied petitioner's request for waiver, and the Commission denied review (*id.* at A18-A22). In doing so, the Commission rejected (*id.* at A20-A22) petitioner's argument that the rule permitting application by minority-owned enterprises violated equal protection principles and concluded that its rule was fully consistent with this Court's decision in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). The court of appeals affirmed without opinion (Pet. App. A12-A13) and denied rehearing (*id.* at A14-A17).

ARGUMENT

Petitioner challenges (Pet. 7-10) the constitutionality of the rule permitting minority-owned applicants to apply to broadcast full time on a newly-opened clear channel frequency without meeting the criteria applicable to others seeking such permission. However, petitioner lacks standing to challenge this rule; accordingly, further review by this Court is not warranted.

"[A]t an irreducible minimum, Art. III [of the Constitution] requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' " (*Valley Forge College* v. *Americans United*, 454 U.S. 464, 472 (1982), quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)). See also, *e.g.*, *Director* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 7; *Larson* v. *Valente*, 456 U.S. 228, 238-239 (1982). In this case petitioner suffered no harm as a result of the Commission's rule regarding applications by minority-owned enterprises. If that rule had not been issued in 1980, petitioner's application would still have been rejected for failure to meet any of the previously adopted requirements. Furthermore, in seeking to broadcast at night on one of the newly-available clear channels, petitioner was competing with non-minority-owned stations that satisfied the Commission's long-established service requirements. Petitioner's attack upon the provision concerning minority-owned applicants seeks to derive a benefit from an issue that has no bearing upon this case.

The flaw in petitioner's argument is illustrated by *Regents of the University of California* v. *Bakke, supra*, the case upon which petitioner relies (Pet. 9-10). In *Bakke*, a white applicant denied admission to medical school challenged the school's special admissions program for minority applicants. Concluding that the particular program at issue violated equal protection, the Court held that Bakke was entitled to admission because the medical school could not show that "but for the existence of its unlawful special admissions program, [Bakke] still would not have been admitted" (438 U.S. at 320 (opinion of Powell, J.); see also *id.* at 410 (opinion of Stevens, J.)). Injury in fact was likewise alleged or shown in other cases involving constitutional challenges similar to petitioner's. For example, in *Fullilove*

v. *Klutznick*, 448 U.S. 448 (1980), upholding a law requiring that 10% of federal funds for certain public works projects be awarded to minority-owned businesses, the parties challenging that law alleged that it had caused them economic injury (*id.* at 455). In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), holding that the affirmative action plan contained in a collective bargaining agreement did not violate provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and (d), senior white employees alleged that operation of the plan "had resulted in junior black employees' receiving training in preference to senior white employees" (443 U.S. at 199). In the present case, by contrast, even if the special rule for minority-owned applicants had never been adopted, petitioner would nevertheless have been precluded from applying for authorization to broadcast at night on one of the newly available clear channel stations. And if that rule were now held invalid, petitioner would still be barred from night broadcasting. Accordingly, petitioner lacks standing to raise the issue upon which he relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Repectfully submitted.

REX E. LEE
Solicitor General

JUNE 1983

DOJ-1983-06